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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID WICK et al., Plaintiffs and Respondents, v. MHC RANCHO MESA, LLC et al., Defendants and Appellants.	D061088 (Super. Ct. No. 37-2009-00064864-CU-BC-EC)

APPEAL from an order of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

MHC Rancho Mesa, LLC and MHC Rancho Mesa, LP (collectively defendants) appeal from an order denying their motion to compel arbitration of claims brought by David and Rhonda Wick. We affirm the court's order. Substantial evidence supported the court's finding that defendants waived their right to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants operate a mobilehome park primarily for senior citizen residents. (See Civ. Code, § 798.76.) In 2004, the Wicks entered into a long-term rental agreement with defendants to lease a space in the mobilehome park. As detailed below, the rental agreement contained provisions requiring arbitration of specified disputes between the parties.

Five years later, in March 2009, the Wicks filed a lawsuit against defendants and others. As against defendants, the Wicks alleged fraud, negligence, and breach of contract. About seven months later, in October 2009, the court entered a default against defendants.

About five months later, defendants moved to set aside the default based on defective service. Defendants submitted evidence that their registered agents had never been properly served with the lawsuit. Defendants also submitted a declaration of an administrative assistant who works at the mobilehome park, who said that on or about April 24, 2009, she discovered the Wicks' summons and complaint "shoved under the door" and she faxed these documents to defendants' attorney. The administrative assistant said she was not authorized to accept service on behalf of defendants.

On April 9, 2010, the court granted defendants' motion to set aside the default, finding the proofs of service were defective as they did not "indicate service on anyone authorized to accept service." The court also found there was no effective substituted service.

About 10 months later, in late February and mid-March 2011, the Wicks properly served defendants' registered agents with the summons and complaint.

Several weeks later, defendants filed a demurrer to the Wicks' complaint. In the demurrer, defendants argued: (1) the causes of action failed to state facts sufficient to constitute a cause of action; (2) the allegations were uncertain and ambiguous; (3) the claims were barred by the applicable statute of limitations; and (4) the claims were barred by a prior settlement and release agreement between defendants and other mobilehome owners.

Defendants also filed a separate motion to dismiss. In the motion, defendants argued the court should dismiss the lawsuit because plaintiffs failed to effect timely service and failed to bring the action to trial within two years of filing the complaint. Defendants also urged the court to dismiss the action on the grounds that the claims were barred by the statute of limitations and by the prior settlement and release agreement.

Defendants also filed a motion for sanctions under Code of Civil Procedure section 128.7. Defendants argued sanctions were appropriate for various reasons, including that the Wicks: (1) entered the default when they knew or should have known it was void based on false or defective proofs of service; (2) wrongfully refused to voluntarily set aside the default; and (3) knowingly filed an action barred by the statute of limitations.

After considering the parties' written submissions and conducting a hearing, the court denied defendants' motion to dismiss and sanctions motion. However, the court sustained defendants' demurrer with leave to amend. In so ruling, the court rejected

defendants' argument that the prior settlement barred the Wicks' claims. But the court found the complaint on its face was time barred and the Wicks did not plead facts showing an exception based on delayed discovery rules. The court also found the complaint was deficient because it was vague and lacked specificity with respect to two causes of action and the Wicks did not attach the written contract between the parties.

Within several days after the court entered these rulings, the Wicks filed a first amended complaint asserting three fraud-based causes of action, and alleging they first learned of the fraud within three years of filing the complaint. About one month later, defendants filed a demurrer, arguing that each cause of action failed to state facts supporting a claim and the allegations were uncertain and ambiguous. Defendants also filed a motion to strike various allegations in the complaint, including the allegations seeking punitive damages.

In August 2011, the court overruled defendants' demurrer and denied its motion to strike. After considering the parties' papers and holding a hearing, the court found the first amended complaint alleged the fraud claims with sufficient specificity and the allegations were sufficient to support a punitive damages claim under Civil Code section 3294.

Several weeks later, defendants moved for the first time to compel arbitration under arbitration provisions in an addendum to the parties' 2004 lease agreement. Under these provisions, the parties agreed to arbitrate "any dispute . . . arising out of or concerning or connected with" the rental agreement or other residency documents. (Capitalization omitted.) The agreement states that an arbitration demand must be made

"within a reasonable time after the claim[,] dispute or other matter in question has arisen," but no later than "the date that institution of legal or equitable proceedings based upon such claim, dispute or other matter would be barred by the applicable statute of limitations."[1] (Capitalization omitted.) The agreement also provides that the parties shall use the JAMS arbitration service; each party must deposit one-half the estimated arbitration costs before the proceeding begins (prearbitration deposit requirement); and the nonprevailing party shall bear the attorney fees and costs. The agreement further states that if the arbitration provisions are held unenforceable, "all arbitrable issues . . . will be . . . referred" to a judicial referee under Code of Civil Procedure section 638. (Capitalization omitted.)

In opposing the arbitration and judicial referee requests, the Wicks argued the arbitration agreement was a contract of adhesion and was substantively and procedurally unconscionable; they were fraudulently induced to enter into the contract; and the arbitration agreement violated various statutes and public policies governing mobilehome parks. The Wicks also argued the prearbitration deposit requirement would deny them a forum to litigate their disputes because they could not afford the deposit amount, which

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1 The "reasonable time" provision states: "A demand for arbitration or request for mediation shall be in writing and must be made within a reasonable time after the claim dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date that institution of legal or equitable proceedings based upon such claim, dispute or other matter would be barred by the applicable statute of limitations. Notice of demand for mediation or arbitration must provide: (A) A description . . . of the dispute; (B) facts from which the dispute arises, including witnesses, dates, times, and circumstances; (C) a description of the relief of action requested." (Capitalization omitted.)

they said could be as much as $18,000 ($600 per hour for the arbitration for 40-60 hours of arbitration services). In support, the Wicks submitted their declarations stating that they are "facing Bankruptcy," Mr. Wick was required to return to work after retirement, their mobilehome is worth less than they owe, and they cannot afford to pay for a private judge.

During the hearing on the motion to compel arbitration, the Wicks' counsel raised the issue whether defendants had waived their right to arbitration by unreasonably delaying in asserting the request. Counsel noted that defendants had repeatedly "asked this court" for "dispositive rulings," and having unsuccessfully "swung the bat several times," they have now changed their course and decided "'oh well, since we can't get the judgment we've asked for, let's arbitrate." At the conclusion of the hearing, the court decided to permit the parties to brief the waiver issues, stating that it "may be that . . . defendants . . . have participated so meaningfully in proceedings before the court, that they have effectively waived their right to enforce an arbitration provision."

In their supplemental briefing, the Wicks argued that defendants' filings constituted meaningful participation in the litigation and showed that defendants "very much wanted this court to rule on this case when they believe[d] it would do so in their favor. Now they want to forum shop and try again. Having asked this court to make a disposition in their case, they should be deemed to have waived the right to take this case elsewhere." With respect to prejudice, the Wicks argued they were required to defend their case on the merits, and "Defendants, having lost on this issue, are essentially forum

shopping seeking to force the Plaintiffs into another judicial system where they can be forced to retry these matters."

In urging the court to find there was no waiver, defendants argued that their prior motions concerned only pleading issues and thus did not constitute litigation on the merits constituting a waiver. They also argued the Wicks suffered no prejudice from any delay in requesting arbitration. In support, they submitted their counsel's declaration discussing the history of the litigation (summarized above), and noting that the parties have not yet engaged in discovery and there is no trial date. In explaining why defendants did not raise the arbitration issue earlier, defense counsel stated: "Defendants have always intended to compel Plaintiffs' claims to arbitration," but before doing so, they "sought to dispose of the entire lawsuit . . . based upon the statute of limitations and the general release in the [prior lawsuit]. . . . [W]hen it became apparent the lawsuit would move forward, Defendants immediately moved to compel all of Plaintiffs' claims to arbitration . . . . "

After considering the parties' papers and conducting another hearing, the court denied defendants' motion to compel. In a lengthy statement of decision, the court found defendants had waived their right to compel arbitration under the six-factor test set forth in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980 (*Sobremonte*). The court explained that defendants' actions were inconsistent with a desire to arbitrate the dispute and defendants had gone "well beyond" the " 'preparation' " phase before "choos[ing] to strategically notify Plaintiffs of their intent to arbitrate." The court identified defendants' litigation actions (including filing multiple demurrers, motions to strike and motions for

sanctions) and emphasized that defense counsel had acknowledged in his declaration that defendants had " 'always intended to compel Plaintiffs' claims to arbitration.' " The court also found the Wicks were "prejudiced by Defendants' strategic decision to delay their request for arbitration by having to invest substantial resources to respond to multiple demurrers, motions to strike and motions for sanctions," and referred to the evidence showing the Wicks have limited financial resources. The court additionally stated that the case "is already more than 900 days old," and that "both sides" have "devoted an inordinate amount of resources to reap the benefits of the judicial system before raising the arbitration issue."

The court rejected the Wicks' alternative arguments that the arbitration agreement was substantively and procedurally unconscionable, except the court stated that it was deferring "at this time" ruling on the issue whether the prearbitration deposit requirement is unconscionable because the deposit requirement would be "cost-prohibitive for plaintiffs." The court also denied defendants' alternate request for the appointment of a referee under Code of Civil Procedure section 638 on the same waiver grounds.

DISCUSSION

I. *Legal Principles Governing Arbitration Waivers*

Federal and state law reflect a strong public policy favoring arbitration as " ' "a speedy and relatively inexpensive means of dispute resolution." ' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204 (*St. Agnes*).) Nonetheless, courts may refuse to enforce an arbitration agreement on waiver grounds. (*Id.* at p. 1195.) Based on the public policy favoring arbitration, waiver claims receive

"close judicial scrutiny" and the "party seeking to establish a waiver bears a heavy burden of proof." (*Ibid.*)

In *Sobremonte*, the court identified six factors that courts should consider in determining whether a party has waived the right to compel arbitration.[2] (*Sobremonte, supra*, 61 Cal.App.4th at p. 992.) Thereafter, in *St. Agnes*, the California Supreme Court agreed that these factors are relevant to the analysis, but admonished that "no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*St. Agnes, supra*, 31 Cal.4th at p. 1195.) Each factor must be examined in the context of the particular circumstances of the case. (*Id.* at p. 1196.) Among the relevant factors identified by the *Sobremonte* and *St. Agnes* courts are whether the moving party asserted the arbitration right in a timely fashion and whether there has been judicial litigation of the merits of arbitrable issues. (*St. Agnes, supra*, 31 Cal.4th at p. 1196; *Sobremonte, supra*, 61 Cal.App.4th at p. 992.) Additionally, the party asserting waiver must generally establish prejudice. (*St. Agnes, supra*, 31 Cal.4th at pp. 1196, 1203.) However, where

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2 These factors include: " '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party. [Citations.]' " (*Sobremonte, supra*, 61 Cal.App.4th at p. 992.)

other factors supporting a waiver are present, the prejudice showing need not be substantial. (See *id.* at pp. 1203-1204.)

Whether a party waived the right to contractual arbitration is a factual question we review under the substantial evidence standard. (*St. Agnes, supra*, 31 Cal.4th at p. 1196; *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443 (*Lewis*); *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 337 (*Augusta*).) The trial court's "determination of this factual issue, ' "if supported by substantial evidence, is binding on an appellate court." ' [Citation.] Only ' "in cases where the record before the trial court establishes a lack of waiver as a matter of law, [may] the appellate court . . . reverse a finding of waiver made by the trial court." ' [Citation.]" (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1450 (*Adolph*); see *Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 12.)

II. *Analysis*

Applying the *Sobremonte/St. Agnes* factors, the trial court found defendants waived the right to arbitrate the Wicks' claims primarily because defendants delayed asserting the arbitration demand until after the court had ruled on certain dispositive motions. The court further found the timing of defendants' motion to compel arbitration prejudiced the Wicks' rights by creating an unnecessary delay and imposing litigation costs on plaintiffs before submitting the matter to an arbitrator. These findings are supported by substantial evidence and justify the court's waiver finding.

First, the record supports that defendants sought to have the case dismissed on its merits before seeking an alternate arbitration forum. The conduct is inconsistent with the

right to arbitration, particularly because the record shows defendants knew about the arbitration provision before they filed any of their motions and always intended to raise the arbitration issue. (See *Augusta, supra*, 193 Cal.App.4th at p. 338; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557.)

There was an approximately five-month delay between the time defendants were properly served and the time defendants raised the arbitration issue. During this time, defendants filed dispositive motions, several of which were on the merits of their defenses, including that the claims were barred by a prior lawsuit and that the claims were barred by the statute of limitations. Litigating issues through demurrers can constitute judicial litigation on the merits justifying a waiver finding. (*Lewis, supra*, 205 Cal.App.4th at pp. 449-451; see also *St. Agnes, supra*, 31 Cal.4th at p. 1201; *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1371, fn. 16; *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1980) 105 Cal.App.3d 946, 951; but see *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1195 (*Groom*).)[3]

Moreover, "a party's unreasonable delay in demanding or seeking arbitration, in and of itself, may constitute a waiver of a right to arbitrate." (*Burton v. Cruise* (2010)

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3 In *Groom*, the court found the trial court's rulings on demurrers did not constitute litigation on the merits. (*Groom, supra*, 82 Cal.App.4th at p. 1195.) However, this conclusion was in response to the particular facts presented in the case. In any event, to the extent the *Groom* court was intending to create a bright-line rule on the issue, we find such a blanket rule unsupported by California law regarding arbitration waivers. (See *Lewis, supra*, 205 Cal.App.4th at p. 451 [disagreeing with *Groom's* conclusion that "multiple demurrers were 'not the equivalent of litigation on the merits' "]; *Gonsalves v. Infosys Technologies, LTD.* (N.D. Cal., Aug. 5, 2010, No. C 3:09-04112) 2010 WL 3118861, *3-*4 [finding *Groom*'s conclusion "neither binds nor persuades this court to reach the same result"].)

190 Cal.App.4th 939, 945.) Defendants provided no reason for the delay other than that they were hoping to have the case dismissed in the judicial forum without the need for arbitration. A party's strategy to delay exercising its arbitration right for the purpose of seeking to prevail in the court system constitutes improper forum shopping and supports a waiver finding. As the *Burton* court noted, a party should not be permitted "to blow hot and cold by pursuing a strategy of courtroom litigation only to turn towards the arbitral forum" once it believes such forum would be advantageous for its own purposes. (*Ibid.*) " 'We are loathe to condone conduct by which a [litigant] repeatedly uses the court proceedings for its own purposes . . . all the while not breathing a word about the existence of an arbitration agreement, or a desire to pursue arbitration.' " (*Ibid*.)

Other courts have found similar delays to be unreasonable and justification for a waiver finding. (See *Lewis*, *supra*, 205 Cal.App.4th at p. 446 [four-month delay in seeking arbitration unreasonable]; *Augusta*, *supra*, 193 Cal.App.4th at pp. 338-339 [six and one-half months between filing lawsuit and motion to compel arbitration]; *Adolph, supra,* 184 Cal.App.4th at pp. 1446, 1449, 1451-1452 [six months between filing lawsuit and demand for arbitration]; *Guess?, Inc. v. Superior Court*, *supra*, 79 Cal.App.4th at p. 556 [less than four months between filing lawsuit and motion to compel arbitration]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1228-1229 [five and one-half months between filing lawsuit and motion to compel arbitration].)

Defendants argue that their motions were not relevant to the waiver analysis because the motions were directed at vacating the default, which must be accomplished in court rather than through arbitration. We agree that the time and costs associated with the

motion to vacate the default cannot be fairly considered a waiver of the arbitration right. However, once defendants successfully obtained an order vacating the default, defendants did not promptly raise the arbitration issue. Instead, they remained silent regarding their intention to seek arbitration and continued to bring motions seeking to have the matter dismissed in court. Although defendants had the right to demand proper service of the lawsuit before they had any obligation to take defensive action in court, for purposes of their contractual arbitration agreement, it was incumbent on the defendants (if they wished to arbitrate plaintiffs' claims) to promptly seek arbitration once they were aware of the claim or dispute.

Relying on the trial court's statement that the "case is already more than 900 days old," defendants argue the court erred in failing to recognize that it was not until late February/mid-March 2011 that they were properly served with the complaint and thus most of the delay was the Wicks' responsibility. However, viewing the court's statement in context, we are confident the court correctly understood the procedural history of the case. In referring to the 900-day period, the court recognized that both parties had "devoted an inordinate amount of resources to reap the benefits of the judicial system," but also later stated that defendants' activity went "well beyond the 'preparation of a lawsuit' before . . . [choosing] to strategically notify Plaintiffs of their intent to arbitrate."

Defendants additionally contend their conduct was not inconsistent with an arbitration request because they did not litigate the claims or defenses on their merits except to address statute of limitations issues.

The record does not support this assertion. Defendants specifically sought dismissal of the matter based on the statute of limitations *and* based on its arguments that: (1) the Wicks' allegations did not state a legal cause of action; (2) the matter was barred by a prior settlement resulting from previous litigation; and (3) the Wicks were barred from bringing the action by failing to bring the matter to trial within two years. These issues required the court to evaluate the claims and defenses asserted in the action, as well as the relevant procedural facts. (See *Lewis, supra*, 205 Cal.App.4th at p. 450 ["litigating issues through demurrers" can constitute judicial litigation on the merits justifying a waiver finding].)

Moreover, even assuming the statute of limitations was the only issue litigated, the court had a reasonable basis to find the assertion of this defense reflected meaningful litigation activity constituting a waiver. Generally, an "affirmative defense that the statute of limitations has run is for the arbitrator rather than the court to decide." (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 26.) In asserting a contrary point, defendants state that under the parties' arbitration contract, the parties were required to bring an arbitration request within a reasonable time, *but no later than the statute of limitations applicable to the claims at issue*. (See fn. 1, *ante*.) Based on this provision, defendants argue that its litigation of the statute of limitations issue was not inconsistent with its later arbitration demand because under the arbitration provision, defendants were prohibited from demanding arbitration if the claims were time barred and that "in simple terms, [defendants were] required to address the statute of limitations issue *before* seeking to compel arbitration."

We are not persuaded, but need not decide the issue. Whether defendants' decision to challenge the statute of limitations issue by demurrer in court was contractually required as defendants assert or an understandable strategy in response to the apparent expiration of the statute of limitations appearing on the face of plaintiffs' original complaint, we would not disturb the court's waiver finding. As noted, in the initial demurrer, defendants did far more to engage the power of the superior court than merely contest whether the claims were barred by the statute of limitations. After the Wicks filed their amended complaint, defendants then responded with another demurrer, rather than moving to compel arbitration in lieu of answering the complaint. (Code Civ. Proc., § 1281.7.) Instead of submitting what had become a factually intensive inquiry to the arbitrator, defendants again sought resolution of this affirmative defense in a judicial forum.

This conduct supports the trial court's finding the defendants were attempting to conclude this matter in superior court and only belatedly exercised their right to compel arbitration. Although parties may elect to litigate in a judicial or arbitration forum, they cannot employ both forums for the same dispute. (See *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784.) A contrary conclusion would contravene the arbitration statutes and public policy providing arbitration as a less expensive and less time-consuming alternative to litigation.

Because defendants delayed several months (without any reasonable justification) before seeking to compel arbitration and there was judicial litigation on the merits of arbitrable issues, defendants' conduct supports the court's waiver finding.

Moreover, the record supports the court's prejudice finding. "In California, whether or not litigation results in prejudice . . . is critical in waiver determinations." (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) " 'The moving party's mere participation in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration.' [Citation.]" (*Augusta, supra*, 193 Cal.App.4th at p. 340.) Generally, " 'courts will not find prejudice where the party opposing arbitration shows *only* that it incurred court costs and legal expenses.' " (*Lewis, supra*, 205 Cal.App.4th at p. 452, quoting *St. Agnes, supra*, 31 Cal.4th at p. 1203.) "But courts ' "may consider . . . the expense incurred by that party from participating in the litigation process" ' and the length of delay as factors bearing on whether the opposing party has been prejudiced." (*Ibid*.)

" '[T]he critical factor in demonstrating prejudice is whether the party opposing arbitration has been substantially deprived of the advantages of arbitration as a " ' "speedy and relatively inexpensive means" ' " of dispute resolution.' " (*Lewis, supra*, 205 Cal.App.4th at p. 452.) " '[C]ourts assess prejudice with the recognition that California's arbitration statutes reflect " 'a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution' " and are intended " 'to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.' " ' " (*Burton v. Cruise, supra*, 190 Cal.App.4th at p. 948, quoting *St. Agnes, supra*, 31 Cal.4th at p. 1204.) Under these principles, "a petitioning party's conduct in stretching out the litigation process itself may

cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes.' [Citation.]" (*Ibid.*)

In this case, the Wicks presented evidence that they had limited financial resources and were required to respond to several sets of motions in which defendants were seeking to have the case dismissed.[4] By imposing these burdens, defendants deprived the Wicks of the benefits available through arbitration, which include a more speedy resolution of the dispute and relatively inexpensive means of dispute resolution. Although this specific prejudice showing was relatively minimal in the context of the entire case, under the totality of the circumstances test, a lesser showing of prejudice may be sufficient where, as here, there has been at least some judicial litigation on the merits of arbitrable issues. (See *St. Agnes*, *supra*, 31 Cal.4th at pp. 1195-1196, 1203-1205.)

Additionally, the trial court made findings supporting that defendants were essentially using their motion to compel arbitration as a means of forum shopping after it was unsuccessful in having the lawsuit dismissed. The courts have recognized that the use of a motion to compel arbitration for such purposes can be a form of prejudice. (See *Kramer v. Hammond* (2d Cir. 1991) 943 F.2d 176, 179 [prejudice can occur when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration]; *Gonsalves v. Infosys Technologies, LTD.*, *supra*, 2010 WL 3118861 at *4, fn. 3; *Conwest Resources, Inc. v. Playtime Novelties, Inc.* (N.D.Cal., May

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4 We reject defendants' contention the court erred in overruling their evidentiary objections to the plaintiffs' declarations regarding their financial status. The fact the statements in the declarations were not supported by "foundational facts" goes to the weight of the evidence, and not its admissibility.

1, 2007, No. C 06-5304 SBA) 2007 WL 1288349, at *5-*6 ["use of arbitration as a method of forum shopping would be prejudicial" to party opposing arbitration].)

In this regard, defendants' reliance on *Groom v. Health Net, supra*, 82 Cal.App.4th 1189 is unhelpful. In *Groom*, the defendant petitioned to compel arbitration shortly after the trial court overruled demurrers to the third amended complaint. (*Id.* at p. 1193.) The trial court denied the petition, finding the defendant's litigation activity constituted an election to abandon the arbitration forum. (*Id.* at pp. 1193-1194.) The Court of Appeal reversed, concluding the plaintiff's filing of several demurrers did not constitute litigation on the merits of the case. (*Id.* at p. 1195.) The court also found the plaintiff did not show any prejudice, noting that the evidence of the plaintiff's time and expense in responding to defendants' demurrers and amending the pleadings was insufficient to support a waiver. (*Id.* at pp. 1197; see also *St. Agnes, supra*, 31 Cal.4th at p. 1203.)

Groom is distinguishable because it was unclear from the *Groom* plaintiff's initial pleadings whether the claims asserted were subject to arbitration. (*Groom, supra,* 82 Cal.App.4th at pp. 1196-1197.) Additionally, the record showed that the *Groom* plaintiff had "artfully drafted" her complaint for the purpose of avoiding arbitration. (*Id*. at p. 1196.) There are no similar facts in this case. Moreover, at least one Court of Appeal has disagreed with *Groom*'s narrow prejudice analysis as being inconsistent with California law. (*Burton v. Cruise, supra*, 190 Cal.App.4th at p. 948; see also *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 844, fn. 9.) *Burton* stated that "*Groom* . . . erred in failing to recognize that a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the

advantages of arbitration as an 'expedient, efficient, and cost-effective method to resolve disputes.' . . . Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel." (*Burton, supra*, at p. 948.) We agree with *Burton*, and find *Groom*'s prejudice analysis does not require a finding that the court erred in this case.

In their appellate briefs, defendants discuss various other *St. Agnes/Sobremonte* factors that would favor a conclusion that they did not waive their right to compel arbitration. For example, defendants note that the parties had not yet engaged in discovery and there was no trial date. However, the trial court specifically considered these and all of the other relevant factors and found that under the "totality of the evidence" defendants had waived their right to compel arbitration. In challenging this conclusion, defendants are essentially requesting that we reweigh the facts and make different inferences than did the trial court. We cannot substitute our deductions for those of the trial court if they are reasonable and supported by substantial evidence. (See *St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) The trial court's waiver conclusion was reasonable and was supported by substantial evidence.

Defendants also challenge the court's finding that they waived their right to require an appointment of a judicial referee under Code of Civil Procedure section 638. We conclude this challenge is without merit for the same reasons that we have found the court's arbitration waiver finding supported.

DISPOSITION

Order affirmed. Appellants to bear respondents' costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

MCDONALD, J.